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No.

IN THE

Supreme Court of the United States

October Term 1979

SAUL M. WEINGARTEN,

Petitioner,

vs.

PAUL BLOCK, MONTEREY PENINSULA HERALD CO., a California Corporation, TOLEDO BLADE COMPANY, an Ohio Corporation, RICHARD B. GIFFORD and MILTON JAQUES,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the United States.

JACQUE BOYLE,
707 Wilshire Blvd., Suite 4670,
Los Angeles, Calif. 90017,
(213) 622-7116,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Questions Presented for Review.

This case involves the application of the privilege defined by this Honorable Court in *New York Times v. Sullivan* (1964) 376 U.S. 254, and *Curtis v. Butts*, (1967) 388 U.S. 130, to a State libel case, and petitioner seeks review of the lower and appellate Courts' determination of his status as a public official and public figure.

Petitioner will further ask review of the trial Court's Judgment of non-suit, granted on its interpretation of that privilege, and its affirmation by the appellate Court, in the event this Honorable Court holds that petitioner was either a public official or public figure.

Thus, the following issues are here presented:

I.

Petitioner's Status.

1. Whether petitioner's legal services as the part-time City Attorney for the City of Seaside, California, warranted imposition of the status of public official, where such service had terminated a year before the publication in question;

2. Whether petitioner's legal services for the Redevelopment Agency of Seaside warranted the imposition of the status of public official, where petitioner was but one of several attorneys performing such services, where the services were on a project basis, and where such services were obscure;

3. Whether petitioner became a public figure, where there was no evidence of his pervasive power and influence, and where the only public controversy involved was one contrived by defendants into which petitioner neither thrust himself nor was involuntarily drawn.

4. Whether the trial Court erred in denying petitioner a trial by jury on the issue of status, and in separately trying that issue.

II.

Petitioner's Non-Suit Burden on Issue of Malice, if a Public Official or Public Figure.

1. Whether trial and appellate Courts applied the proper test to a motion for non-suit in a political libel case;

2. Whether defendants' motives and methods of investigation and reporting, were relevant to the issue of Actual Malice;

3. Whether the evidence established defendants' knowledge of falsity, sufficient to withstand their motion for non-suit, where defendants fabricated, and inaccurately described, petitioner's conduct.

4. Whether the evidence established defendants' reckless disregard for the truth, sufficient to withstand their motion for non-suit, where defendants relied upon unconfirmed rumor, and opinions of persons known to harbor resentment to petitioner, for their defamatory article.

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Judgment and Opinion Below.

The Judgment of non-suit here presented for review is attached hereto as Appendix "A", and the Findings of Fact and Conclusions of Law with respect thereto are further attached hereto as Appendix "B". The Opinion of the Court of Appeal, First Appellate District, affirming the trial Court's Judgment of non-suit is attached hereto as Appendix "C", and is reported as *Weingarten v. Block, et al.*, (1980) 102 Cal.App.3d 129, 162 Cal.Rptr. 701. Petitioner's Petition for Rehearing in said Court was denied without further opinion, and said denial is attached hereto as Appendix "D". Petitioner's Petition for Hearing before the Supreme Court of California was denied without opinion, and said denial is attached hereto as Appendix "E".

Jurisdiction.

The Judgment of the lower Court was filed and entered on January 18, 1977. The decision of the Court of Appeal was entered on February 14, 1980. A timely Petition for Rehearing was filed, and the same was denied on March 14, 1980. Petitioner's Petition for Hearing before the California Supreme Court was denied on April 10, 1980, without opinion. This Petition for Writ of Certiorari is filed within ninetydays from said date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

Constitutional Provisions Involved.

First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment to the United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

Petitioner was admitted to the practice of law in California in 1950. He moved to the Monterey Peninsula area in 1951 and opened his law office in Seaside in 1955. While always in private practice, he served as attorney for the Cities of Pacific Grove, Gonzales and Seaside, and further performed legal services for the Redevelopment Agency of the City of Seaside during the ensuing years.

His legal services for the City of Pacific Grove occurred in 1954, and was for a period of approximately 3 to 6 months. He was the part-time City Attorney for the City of Gonzales for almost 20 years, from 1954 to 1974. He was the part-time City Attorney for the City of Seaside, from 1955 until October, 1970. And petitioner performed legal services for the Redevelopment Agency of Seaside from 1963 until after the trial of his lawsuit. His services for the Redevelopment Agency were on a project basis, and while the Agency did retain petitioner during that period of time, they also utilized the services of other attorneys on the same terms.

Petitioner did not have a policy-making role in any of his public positions. Rather, he eschewed participation in policy decisions, in his representation of public entities.

In October, the City Council terminated petitioner's ser-

vices as Seaside's City Attorney in the context of some controversy. Nevertheless, the Council commended petitioner and presented him with a plaque in appreciation for his services.

At about this time, defendant BLOCK became interested in the local politics of the Monterey Peninsula area. Although his parent corporation, defendant TOLEDO BLADE COMPANY had owned the Monterey Peninsula Herald since 1966, he took active control of the paper in September 1970. He moved Charles W. Gilmore from his Eastern operation and installed him as the editorial director of the Monterey Peninsula Herald in September of 1970.

Shortly after petitioner's termination as City Attorney of the City of Seaside, a recall campaign was instituted to recall four of Seaside's City Councilmen. Petitioner briefly represented one of the organizations involved in that recall, in February, 1971. Defendants opposed the recall, but the movement succeeded and the recall election was set for June, 1971. Defendants supported the four City Councilmen subject to recall. Nevertheless, three were recalled and removed from office. Shortly thereafter, defendant BLOCK assigned his ace investigative reporter, defendant JAQUES to the Monterey Peninsula Herald for the purpose of investigating petitioner and writing an "expose" of the petitioner's personal and professional life.

Defendant JAQUES remained on his assignment from August 1, through the first or second week in October of 1971, except for brief periods of time. Defendants' first defamatory article appeared in the Monterey Peninsula Herald on September 9, 1971. Thereafter, subsequent articles and editorials reiterated the same defamatory charges, or further otherwise demeaned petitioner. The first article contains the defamatory language of this case subject to review, and that article is set forth in full as an exhibit to the Opinion

of the Court of Appeal, attached hereto as Appendix "C" at pages C-27 to C-33. The second article appeared in defendants' newspaper after petitioner demanded retraction, and is set forth in full as footnote 6 to the Opinion of the Court of Appeal (Appendix "C" at page C-10).

The falsity of the defamatory matter, and defendants' actual malice, are more particularly documented and discussed in the argument section of this Brief, but the substance of that article and the falsity of the most defamatory portions here involved, are summarized as follows:

1. *Dishonesty*. Petitioner is charged with using his position as attorney for a closed corporation of his friends (all of whom were Naval officers) to covertly draw $30,000.00 per year in legal and consultant fees. The article also states that "some found him difficult to follow in business transactions, particularly in his recollections of earlier verbal agreements." Both contentions were false. Petitioner's earnings from that Corporation during the nine years that he was its legal counsel, were $4,500.00, or about five hundred dollars per year, and he received nothing for his services as an officer of that Corporation.

2. *Racial Bias*. The article states that Black residents were "disturbed" by petitioner's appearance in a civil rights case, and that minority groups equated his stance as City Attorney as requiring action "in their behalf instead of legal opposition." This charge was also false. The ostensible basis of this accusation was a civil lawsuit, wherein petitioner asserted the rights of the members of *one minority group* (Oriental) in a suit by a member of *another minority group* (Black). Further, the case was settled to the satisfaction of the Black minority litigant, and petitioner had been instrumental in negotiating that settlement. Petitioner never, at any time, took any stance against any minority group.

3. *Unprofessional conduct*. The articles cites the trial judge in the *Parker* case to the effect that he thought petitioner had been guilty of a violation of the State Bar Act. Defendant Jaques then asserted that the Seaside City Council would "not have the advise or assistance of the Bar Association" in making its appointment to the vacant City Attorney's post, all reasonably inferring a State Bar disciplinary record against petitioner that would bar petitioner from consideration for public office. The article continues by allegedly quoting a "judicially-inclined older member of the Bar", as stating of petitioner's conduct, "Where there is smoke, there may be fire."

The article further refers to several lawsuits, one by a *Mrs. Schact* against petitioner, inferring that petitioner was implicated because California Code prohibits attorneys from advising or assisting clients from avoiding court Judgments, and a second action concerning a *Diana Charbonneau*, inferring that petitioner claimed her property after using "insider information on land sales", where he had previously represented her.

All of such allegations, and their defamatory inferences regarding petitioner, were false. Petitioner had not been the subject of State Bar discliplinary proceedings and the article's concession that "formal complaints lodged with the Bar Association against . . . (petitioner) have been turned aside as inconsequential," does not vitiate the inference that petitioner had a State Bar record of professional misconduct. The "older member of the Bar", identified as Judge Eugene Harrah, denied the quote attributed to him and further denied that the investigative reporter had stated any suspicions about petitioner to which he would have made such a reply.

The Schact case was never litigated, but settled, and that settlement was made by petitioner on Mr. Schact's representations that he, Mr. Schact, would pay the settlement

and hold petitioner harmless therefrom. Petitioner never advised or assisted his client to avoid the Judgment in favor of Mrs. Schact. Rather, he aided Mr. Schact in the sale of his house in the honest belief that Mr. Schact needed the money to pay the judgment against him.

The *Charbonneau* case is also misstated. Petitioner never sought to claim the Charbonneau property as his own, never had access to "insider information", and was involved in her quiet title action because of a $250 judgment lien for fees. Petitioner received Summary Judgment as to the specific charges of the Charbonneau complaint against him, and his only interest in the case, that of the lien for fees, was affirmed by stipulation and the judgment of the case.

Finally, the citation from the *Parker* case was taken out of context. The Court in that case, on the same page of the transcript from which the defendants'quotation was taken, stated, "I don't think Mr. Weingarten intended to do a wrong, but that isn't the question. Did he do a wrong, knowingly or unknowingly or willingly or unwillingly, isn't that true?" Mrs. Parker's attorney, of the same firm defending this lawsuit, himself was quoted in the same transcript as saying "I am inclined to think that Mr. Weingarten put himself into a position . . . where there was almost nothing he could do there that was right as far as receiving this money was concerned."

Petitioner was never subjected to any State Bar discipline because of the Parker case, or for any other conduct.

4. *Fraud*. Defendants' article dwells upon the lawsuit of Mrs. Parker against petitioner, and states that "lawyers still argue whether (petitioner) was actually found guilty of fraud in the suit". Defendants again misstate the facts. Petitioner, in the Parker case, represented a mother and son in a legal matter. At some point, his clients contested their various positions, and petitioner found himself in possession

of funds to be applied for several debts or claims against their property, without specific instructions from either. The trial Court did originally charge petitioner with constructive fraud, but reversed its Judgment in that respect on petitioner's (defendant in that case) Motion for New Trial. The granting of the Motion for New Trial, subject to remissions, was accepted by Mrs. Parker, and the Judgment was thus amended. It should be noted that the trust funds in petitioner's possession did not go to the petitioner, but were used by him to discharge tax liens against Mrs. Parker's property, and the Court found that such payment of taxes was a *negligent* misappropriation of funds.

The Findings with respect to constructive fraud were stricken or obviated by the trial Court's conditional granting of petitioner's Motion for New Trial, accepted by Mrs. Parker, and the Appellate Court's decision eliminating some findings and rendering others inapplicable to the Judgment. The final Judgment was therefore for money damages, not fraud.

5. *Illegal Activities*. In addition to the claim that the "Urban Redevelopment Attorney (petitioner), using insider information claimed the property as his own", the article accuses petitioner of using his office for "rump sessions of the city council". The falsity of the insider information has been previously discussed. Further, petitioner's denial of using "insider information" for his benefit, whether in the circumstances of the subject article, or at any other time, was never rebutted by defendants. Knowledge of any "rump sessions", intended by defendants to mean an "unofficial, probably off the record meeting" and an "unofficial session that would have been illegal", was also unequivocally denied by the petitioner, and defendants offered no evidence of such illegal meetings.

6. *Misuse of Public Trust for Personal Gain*. The ac-

cusation that petitioner, as the Redevelopment Agency attorney, used "insider information" on land sales, together with the claim that petitioner amassed a $1,500,000.00 fortune in his 15 years as the City Attorney, "where he earned more than $50,000.00 in some years from his public employment, and where the Redevelopment plum paid him more than $41,000.00 a year", together with other references to petitioner's public service and "prolific real estate and legal practice", inferring misuse of petitioner's public office and trust for personal gain, were further misstatements of facts. Petitioner's net worth stemmed from investments prior to his services as Seaside's City Attorney. The Redevelopment Agency employment paid petitioner $41,000.00 *gross* in one extraordinary year. Court costs and other expenses would, of course, reduce that sum considerably. His gross in that service averaged between $7,000.00 and $12,000.00 per year and petitioner was paid approximately $11,000.00 per year as Seaside's City Attorney, not $20,000.00 as inferred by the article. Despite defendants' extensive examination of all of petitioner's real estate transactions, they never could produce any evidence of any purchase or sale of property by petitioner that was in any way connected with his public service.

Found among the mass of papers and documents presented by defendants belatedly, at the time of trial, in response to demand for production of documents, was a 1971 memorandum of a telephone conversation between defendant JAQUES and the attorney who represented the defendants at the trial of this case. The document clearly suggests that defendant JAQUES' purpose in investigating the petitioner, and in writing the defamatory articles here at bar, was motivated by a desire to harm the petitioner, and that his investigation was undertaken in such a way so as to

harm the petitioner, not in pursuit of truth or to give an unbiased account of the petitioner's activities.[1]

Other pertinent material evidence of this case will be documented and discussed in the Argument portion of this brief.

The federal question of this appeal concerns the applicability of the *New York Times v. Sullivan* doctrine to this case, and, in the event this Court determines that petitioner was a public official or public figure, the propriety of the Judgment of non-suit in the application of that doctrine. This question, involving First and Fourteenth Amendment rights, was a part of the case throughout all proceedings, from the pleadings through the appellate court decision, and the case was tried, and determined, as an action subject to that doctrine.

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[1]That note stated: "Etienne says that there is not only the Parker case but suspicious of using inside information as city atty to his personal advantage. says that they have considered going after Weingarten through the bar assn. But that it is collossal job. I told him that maybe we could help if they give us the leads. This he said they can do. As always—they do not want to get into a rhubarb personally and I assured him that we would be discreet." (Exh. 10).

REASONS FOR GRANTING THE WRIT.

I.

PETITIONER'S STATUS.

The first portion of petitioner's argument will discuss the trial and appellate Courts' determination that petitioner was both a public official and public figure. Insofar as petitioner's services as City Attorney for the Cities of Gonzales and Pacific Grove are concerned, neither of such posts have been argued by defendants, or mentioned in the Opinion of the Court of Appeal, as supportive of either such status. Petitioner' services as City Attorney for the City of Pacific Grove were limited, and had ended some seventeen years prior to the publications of this lawsuit. His service as City Attorney for the City of Gonzales, although ongoing and continuing to the time of such publications, were minimal and consumed but a fraction of petitioner's time. They were of such limited public interest that defendants did not even discuss such services in their articles.

1. Petitioner's Legal Services as the Part-Time City Attorney for the City of Seaside, California, Did Not Warrant Imposition of the Status of Public Official to Petitioner, in This Case.

In considering how far into the lower ranks of governmental employees the "public official" designation would extend for the purpose of the *New York Times v. Sullivan* rule, this Honorable Court, in *Rosenblatt v. Baer*, (1966) 383 U.S. 75, at 85, has held that the rule would extend to that "hierarchy of government employees who have, or appear to the public to have, substantial responsibility for, or control over, the conduct of governmental affairs".

The Opinion of the Court of Appeal discusses petitioner's part-time services as City Attorney for the City of Seaside, to support its determination that petitioner was a "public

official''. Its Opinion holds that petitioner, by such services, had ''substantial control over the conduct of governmental affairs of Seaside''. That conclusion has no support in the evidence of this case. Petitioner has no legislative or executive functions, and his counsel was that of an attorney to his client. No testimony, documentation, or other evidence suggested that petitioner influenced, or even attempted to influence, any ordinance, rule, regulation or program of the City. To the contrary, petitioner testified to the absence of any such involvement, and his testimony was never rebutted.[2]

In *Zeck v. Spiro*, (1966) 52 Misc.2d 629; 276 NYS2d 395, the plaintiff was the attorney for a County Sewer District. There, the Court held that such position did not render the plaintiff a public official, even though Mr. Zeck's law firm received fees in excess of $230,000.00. Here, petitioner's position as a part-time City Attorney for the City of Seaside was of a miniscule nature, compared to Mr. Zeck's involvement with the County Sewer District.

More significantly, the Opinion of the California appellate Court does not mention the termination of petitioner's services as Seaside's City Attorney, almost a year prior to the publication of the first of the defamatory articles here involved. Petitioner had no substantial responsibility for, or control over, the conduct of governmental affairs, while acting as the City's Attorney, and any appearance of such responsibility and control would have long since vanished in the year between the termination of his services and the defamatory publications that are the subject of this lawsuit.

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[2]Petitioner's testimony, when asked if he had anything to do with policy-making in his position as City Attorney for Seaside was ''No, I had no policy making function at all'' (RT 101, line 26 to 102, line 1) and as to his position as an attorney for the Redevelopment Agency, ''No, I . . . just performed legal services that they would request'' (RT 112, lines 20-23); such testimony was not rebutted.

2. Petitioner's Legal Services for the Redevelopment Agency of Seaside Did Not Warrant the Imposition of the Status of Public Official to Petitioner, in This Case.

The conclusion of the Court of Appeal, in its Opinion, that "Weingarten has played an active and important role in the Redevelopment Agency since its inception in 1963, and has received much publicity concerning his role in the Redevelopment Agency throughout its history," was not entirely accurate. While there was undoubtedly public interest in that agency at its inception, interest had dwindled in the ensuing years, and petitioner's service to the agency received practically no publicity in the year prior to the defamatory publications in question. By the time of those publications, petitioner's representation of the Redevelopment Agency was insignificant. That agency's functions were so obscure that defendants' newspaper, although it listed meetings of the Monterey Park and Recreation Committee and the Seaside City Council, did not note the meetings of the Redevelopment Agency in its column called "Peninsula Datebook", which lists the sessions of various public agencies and groups. Petitioner's legal services for that agency gave him no authority, title or status. The agency was but one of petitioner's clients, and petitioner was but one of several attorneys that represented the agency.

As noted, the Court of Appeal concluded that petitioner, "As city attorney and attorney for the Redevelopment Agency, had substantial control over the conduct of governmental affairs of Seaside." No evidence was elicited to substantiate that holding, and, to the contrary, plaintiff's testimony to the effect that he did not participate in basic policy making and had but limited legal discretion was never rebutted by respondents.

Cases referring to public officials have uniformly referred

to employees. Plaintiff was neither an employee nor an elected or appointed official in any context, but merely an attorney representing a public agency, from time to time, on a retainer basis.

The circumstances of this case, and petitioner's occasional representation of the Redevelopment Agency, do not warrant impugning to petitioner the status of public official as defined by the *New York Times v. Sullivan* doctrine.

3. Petitioner Not a Public Figure.

This Honorable Court, in *Gertz v. Welch*, (1974) 418 U.S. 323, has defined two categories of public figures. The first category includes persons who achieve "such pervasive fame or notoriety that they become public figures for all purposes and in all contexts". The second category encompasses the individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues" (418 U.S. 323, at 351).

Respondents and the Court of Appeal reach back to petitioner's social and political activities in the 1950's to suggest his status as a public figure, within the first test of *Gertz v. Welch, supra*. Thus, they noted that his service on the Democratic Central Committee of Monterey County and of the State Central Committee, as well as his candidacy for the State Assembly in 1958, and held that his "activities as City Attorney, Attorney for the Redevelopment Agency and as a civic leader", afforded him "significantly greater access to the channels of communication that does an ordinary private person." This conclusion is again, without support in the evidence. The record discloses only that petitioner, on one occasion, wrote to defendants' newspaper, for correction of an article they printed, and that defendants issued a correction and retraction, something any reader could have done with the same results.

The Appellate Court mentions numerous articles about, or naming, petitioner in the years preceding the subject publications, as well as petitioner's position as a "civic leader". This Court has held in *Times, Inc. v. Firestone*, (1976) 424 U.S. 448, and *Gertz v. Welch, supra*, that such newspaper publicity, notoriety in general, or publicity other than matters of great public interest, does not make one a public figure subject to the *New York Times v. Sullivan* privilege.

Here, it should be noted, that as the jury was impaneled, as many knew of Mr. Etienne, respondent's counsel, as knew of petitioner.

The appellate Court acknowledges the second test of *Gertz v. Welch, supra*, and quotes from that case:

> "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare . . . More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." (At 345)

The application of the foregoing to this case excludes petitioner from the status of public figure.

After the termination of petitioner's service as City Attorney of Seaside, in October, 1970, petitioner withdrew from public view. He surfaced briefly to represent one of the recall organizations, for a court appearance, although that organization had other counsel. The appellate Court concluded that petitioner therefore "thrust himself in the vortex of the public controversy generated by the recall campaign." Despite the fragility of that contention, that position is immaterial to this case, because the recall campaign ended in June, some three months before the defam-

atory publications, and that campaign was not a controversy, nor even the subject of defendants' newspaper articles of September and October, here involved. And there was no controversy leading to the publications in question, except that generated by the defendants, by their inference that petitioner was being considered to fill the City Attorney vacancy. Petitioner had no intention of filling that vacancy, and nobody involved had any intention of requesting his return to that position.

This Court has held, in *Hutchinson v. Proxmire*, (1979) 61 L.Ed.2d 411:

> "Those charged with alleged defamation cannot, by their own conduct, create their own defense by making the claimant a public figure. Nor is the concern about public expenditures sufficient to make petitioner a public figure, petitioner at no time having assumed any role of public prominence in the broad question of such concern."

The foregoing has particular application to this case. If there was a public controversy concerning filling the vacant City Attorney post of the City of Seaside, petitioner did not thrust himself into that issue, and did nothing to influence its resolution, one way or another. He made no public or private statement, opinion or recommendation relative to that "controversy", and was not even approached by the defendants, so that he could give his opinion. In fact, he did not even know of such "controversy" until after the publication of the subject articles.

4. The Trial Court Erred in Denying Petitioner a Trial by Jury on the Issue of Status, and in Separately Trying That Issue.

II.

STANDARD FOR REVIEW OF PROCEDURE AND EVIDENCE.

Plaintiff requested a trial by jury. Prior to impaneling the jury, the trial Judge determined that plaintiff was a public official and public figure, and thus invoked the *New York Times v. Sullivan* doctrine, in a bifurcation of the case and court trial, as to those issues.

In its determination of the plaintiff's status as a public figure and public official, the Court denied plaintiff his right to trial by jury, as afforded by the Seventh Amendment to the *United States Constitution* and Article I, Section 7 of the *California Constitution*.

Mixed questions of fact and law, where the facts are in dispute, are traditionally within the providence of the trier of facts (*Good Government Group of Seal Beach, Inc. v. Superior Court*, (1978) 22 Cal.3d 672; 150 Cal.Rptr. 258), including the question of privilege (*Adams v. Cameron*, (1915) 150 P. 1005; *Clark v. McClurg*, (1932) 9 P.2d 505). Thus, the trial Court's determination of this issue, by court trial, denied petitioner his right to a trial by jury on *all* issues of fact.

III.

PETITIONER'S NON-SUIT BURDEN ON THE ISSUE OF MALICE, IF A PUBLIC OFFICIAL OR PUBLIC FIGURE.

1. The Trial and Appellate Court Did Not Apply the Proper Test to Defendants' Motion for Non-Suit in This Case.

The District Court of Appeals acknowledged the standards cited in *Guam Federation of Teachers v. Ysrael*, (9th Cir. 1974), 492 F.2d 489, *cert. den.*, 419 U.S. 872, 92

S.Ct. 132, 42 L.Ed.2d 111, and cites the pertinent holdings of that case, as applied to the tests to be utilized by the trial court in determining a motion for non-suit in a political libel case.

> ". . . We think that a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact.
>
> "The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury." (Opinion, Appendix, page C-15)

Notwithstanding this language, both the Trial Court and the District Court of Appeals failed to give the petitioner the benefit of the evidence, but rather, their interpretation of the evidence suggests the application of the stricter standards of *Bon Air Hotel, Inc. v. Time, Inc.*, (5th Cir. 1970) 426 F.2d 858.

The Appellate Court's discussion as to defendant Block's attitude as to truth or falsity of the material published, ignores the admitted and conceded fact that neither Mr. Block nor the investigative reporter, Mr. Jaques, ever, at any time, interviewed the petitioner, nor anyone except those known to be hostile to the petitioner, and those that bore petitioner illwill. Further, the Appellate Court's discussion of the Parker case, at page 20 of the Opinion, does not acknowledge that petitioner never made any profit from the transaction involving Mrs. Parker, and neglects to note that the Parker case had been reviewed many times in the years preceding the subject defamatory articles, and had been laid to rest prior to the termination of petitioner's position as City At-

torney for the City of Seaside. It merely states, instead, that the Parker case "apparently was one of the factors that led to Weingarten's termination as City Attorney", an unwarrented inference unfavorable to plaintiff.

In the Appellate Court's discussion of Mr. Jaques' research, no mention is made of Mr. Jaques' statement that he was assigned to explore and write about the petitioner's "problems and troubles" And while it is true that Mr. Jaques interviewed the individuals hostile to petitioner mentioned on Page 21 of the Opinion, the Appellate Court failed to mention that Mr. Jaques did not interview any person in the Schacht case, except Mrs. Schacht and her attorney, nor any of the shareholders in the All-Nav matter, other than the "dissidents", nor any black individuals other than the one black involved in the housing discrimination action, nor anybody other than Mrs. Charbonneau in the Charbonneau case. Mr. Sorre's testimony, reviewed on Page 22 of the Opinion, does not establish defendant Block's lack of malice, but rather, to the contrary. Mr. Sorre stated that Mr. Jaques had been brought out as a hatchet-man on the Weingarten story. Notwithstanding the "qualification" suggested by the Appellate Court, the inference most favorable to the petitioner, was that Mr. Jaques was "brought out as a *hatchet man*, for Block in the Weingarten story".

The Appellate Court suggestion that "the reference to the possible return of Weingarten as City Attorney for Seaside was not defamatory" (Opinion, p. 24), does not explore the fabricated character of that reference. There was no legitimate source of that information, and it was fabricated to create a "newshook" to justify the defamatory publications and to create a "public controversy", so that defendants could hide behind the *New York Times v. Sullivan* privilege.

The statement that some found petitioner "difficult to follow in business transactions", in the subject article, re-

garding petitioner's recollection of earlier oral agreements, is a clear inference of dishonesty, and leaves no room for any other conclusion.[3] It was clearly unsupported by any evidence, was false, and maliciously published.

The Opinion, on Page 26, misstates the record where the Appellate Court suggests that there were "a number of incidents where Weingarten's stand as City Attorney or for the Redevelopment Agency was opposed by a segment of the Black community". The Appellate Court's discussion of the facts involved are predicated upon the *opinions* of Mr. Carey, the recalled City Council member, obviously antagonistic toward petitioner, but no other members of the Black community. There is no justification for the blatant accusation that petitioner had taken $30,000.00 in fees from the All-Nav Corporation; a lie of "whole cloth", without any substance, and the reasonable inference, which the Appellate Court must draw from such unsubstantiated falsehood, was that the same was fabricated, and therefore malicious within the *New York Times v. Sullivan* doctrine (Opinion, p. 27).

All reasonable inferences to be drawn from other evidence of the case, hereinafter set forth, and elsewhere discussed in this Brief, if construed most favorably for the petitioner, and indeed within the most reasonable inferences that can be drawn from such evidence, inescapably establishes the defendants' "actual malice" as defined by the *New York Times v. Sullivan* doctrine.

2. Defendants' Motives and Methods of Investigation and Reporting Defined Defendants' Actual Malice.

A. Defendants' Motive and Purpose.

Actual malice, within the purview of *New York Times v.*

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[3]Mr. Jaques testified that he meant to refer to petitioner's "forgetfulness" (RT 602, lines 19-23).

Sullivan, is not defined as illwill, bias, or spite. But such factors may be relevant to the issues of *reckless disregard for truth*, or *known falsity*, of that doctrine. In *Goldwater v. Ginzburg*, (2nd Cir. 1969) 414 F.2d 324, the court considered motive and purpose of the defendants, and held that while neither negligence or failure to investigate, on one hand, nor illwill, bias, spite, or prejudice, on the other hand, *standing alone*, were sufficient to establish either *known falsity* or *reckless disregard for truth*, they were material to such issues.

Here, defendant BLOCK began his crusade against the plaintiff as an exercise in illwill and to indulge his authority as the head of a giant newspaper chain. He was frustrated in his attempts to influence the local politics of the Monterey Peninsula area after purchasing its only daily newpaper. Petitioner was an identifiable opposition to the positions espoused by defendant BLOCK. Petitioner briefly represented the recall organization while defendant BLOCK opposed that recall. All four councilmembers that were the subject of the recall were supported by defendants. The recall movement was successful and three of the four councilmembers were recalled.

While corrupt motive or personal spite does not constitute actual malice, such subjective factors may be relevant to that issue (See *Hotchner v. Castillo-Puche*, (S.D.N.Y. 1975) 404 F.Supp. 1041, at 1047). Here, defendant ordered his investigative reporter to delve into and again rehash the *Parker* case, notwithstanding its prior extensive coverage in defendants' newspaper, and to explore and write about the petitioner's "problems and troubles".

Any doubt as to the defendants' bias and illwill, and their corresponding intent and purpose in their investigation of the petitioner and the publication of the subject articles, can be easily dispelled by a review of defendant Jaques' mem-

orandum of his telephone conversation with the law offices of Noland, Hamerly, Etienne and Hoss, the attorneys for petitioner's antagonist in the *Parker* case. (Footnote 1, ante).

B. Method of Investigation and Reporting.

Just as motive has a bearing upon the determination of actual malice, so does the method of investigating and reporting the subjects explored by the articles.

In *Curtis Publishing Co. v. Butts, supra*, the defendant's policy with respect to investigating and reporting particular items was characterized by the Supreme Court as "sophisticated muck-raking", and a factor in determining the issue of actual malice. In *St. Amant v. Thompson*, (1968) 390 U.S. 727, the Supreme Court held that the publisher's professions of good faith are unlikely to be persuasive, where he has obvious reasons to doubt the veracity of his informants, or where the allegations were so inherently improbable that only a reckless man would have put them in circulation.

When the defendants began their investigation, they planned to present their article as a news item. Having nothing upon which to substantiate that stratagem, they improvised a "newshook" by fabricating an intention of the City Council to rehire the Petitioner. Defendant JAQUES testified that he could "not remember" who had told him of that intention. And defendant JAQUES, after he wrote the first article showed it to defendant BLOCK'S editorial director, who was in charge of the *editorial policies* of the newpaper, instead of the news editor.

In their investigation of the petitioner, defendants not only pursued sources of information from persons known to be hostile to petitioner, but declined the pursuit of any verification or rebuttal of the "evidence" against petitioner.

Thus, in "investigating" the matter of racial bias, they interviewed the Black petitioner in an action against an Oriental, where petitioner had represented the latter and Pearl Carey, one of the City Council members who voted to terminate the petitioner's services as City Attorney, and had subsequently been recalled (RT 607, lines 19-23). In reviewing the petitioner's association with the All-Nav Corporation, they talked only to the dissidents. In exploring the *Schact* case, the *Parker* case, and the *Charbonneau* case, they reviewed those lawsuits against the petitioner with the attorneys representing petitioner's antagonists, and one of the litigants that had sued the petitioner. In short, they conducted their investigation of petitioner's "troubles and problems" to ferret out any defamatory rumor or adverse opinion that may have existed in the minds of those who would be most likely to harbor resentment toward the petitioner.

On the other hand, defendants never interviewed petitioner, nor questioned him with respect to any of the items of the article. On the question of racial bias, defendants could not identify any other Black resident that they interviewed, except as above-noted. Nor did defendants interview any of the other officers of the All-Nav Corporation, except those that they identified as dissidents. In addition, they did not interview Mr. Haddad, the mayor of Seaside at the time of the termination of petitioner's position as City Attorney, and the one member of the City Council who had voted against that termination. In other words, the defendants effectively "stonewalled" themselves against any possible information that would dispel the demeaning and defamatory rumor and opinion that they so selectively sought. Their conduct was a departure from normal reporting procedure, and is clear and convincing evidence of the defendants' reckless disregard for the truth in the publication of those articles.

3. The Evidence Established Defendants' Knowledge of Falsity, Sufficient to Withstand Their Motion for Non-Suit.

Evidence of state of mind in the matter of actual malice must generally rest upon circumstantial evidence as a defendant in a defamation suit will rarely, if ever, affirm his knowledge of the false character of his publication. Thus, a defendant's knowledge in this respect may be found from his obvious fabrication of defamatory matter (See *Goldwater v. Ginzburg, supra*; and *St. Amant v. Thompson, supra*), his culpable misstatement of known facts (*Montandon v. Triangle Publishing, Inc.*, (1975) 45 Cal.App.3d 938, 120 Cal.Rptr. 186), or his distortion of truth for defamatory effect (*Carson v. Allied News, supra*).

In *Montandon v. Triangle Publishing, Inc.*, a published program note identified the petitioner as a guest on a program entitled "From Party Girl to Call Girl".

The California Appellate Court found that the defendant's protestation that he did not believe that the average reader would interpret the published program note as relating the Petitioner to a call girl, "flies in the face of reason", and was proof of convincing clarity that the article was not published in good faith, but with actual malice as defined by *New York Times v. Sullivan*. And in *Carson v. Allied News, supra*, the court found actual malice within that doctrine, where the defendant fabricated supposed conversations of the Petitioner.

In addition to the improvised "newshook" as previously discussed, defendants knew that Petitioner did not earn $20,000.00 per year in his position as Seaside's City Attorney, as inferred by the article, but that his salary was not more than $12,000.00 per year. Nor did they have any reason to believe that Petitioner had engaged in a prolific real estate practice. Defendant JAQUES admits that his use

of the phrase "insider information" may have been an incorrect term. And the court files which he so thoroughly reviewed showed Petitioner's innocence of any such activity. And Defendant JAQUES had "no idea now why" he had exaggerated his information that the Redevelopment agency had paid Petitioner $41,000.00 in *one* year, to the $41,000.000 *a* year statement of the article.

Defendants must have known that their racial smear was false, from the above discussion on racial bias. Defendant JAQUES further admits that his use of the term "minority groups" opposed to Petitioner's representation of a client in a civil rights action, "may have been imprecise", in view of the fact that both sides of that case were members of minority groups.

The clear inference of the article that Petitioner was dishonest, from the statement that "some found him difficult to follow in business transactions, particularly in his recollections of earlier verbal agreements", was false and known to be false by the defendants. Their testimony that they were referring to the Petitioner's "forgetfulness" is patently absured. Further, defendants knew that petitioner was not found guilty of fraud in the *Parker* case. Defendant JAQUES testified that Mrs. Parker's lawyer, Mr. Hoss, had expressed his opinion of Petitioner's culpability, but that he, JAQUES, had read an article in *defendants' paper* stating that Petitioner had *not* been found guilty of fraud. Finally, the statement attributed to Judge Harrah, "Where there is smoke, there may be fire" was pure fabrication, as above-noted.

4. The Evidence Established Defendants' Reckless Disregard for the Truth, Sufficient to Withstand Their Motion for Non-Suit.

Generally, reliance upon a questionable source (*St. Amant v. Thompson, supra*), or unconfirmed rumor (*Guam Fed-*

eration of Teachers v. Ysrael, (9th Cir. 1974) 492 F.2d 438), have been held to be clear and convincing evidence of reckless disregard for truth.

In *David v. Schuchate*, (D.C. Cir. 1975) 510 F.2d 531, the defendants' attempt to excuse the defamatory statements by arguing that he had a justifiable and good faith confusion between "indictment" and "conviction", was rejected by the court's findings of his knowledge to the contrary, and that the defendant had therefore published his defamatory article in reckless disregard for truth. (510 F.2d 531, at 736). And failure to investigate a story when not a "hot news" item, will also suffice to establish defendants' reckless disregard for the truth (*Curtis Publishing Co. v. Butts, supra*) and *Hotchner v. Castillo-Puche, supra*).

And in *Vandenberg v. Newsweek, Inc.*, (5th Cir. 1975) 507 F.2d 1024, the court held that "when the story is not "hot news", as is the case here, the investigation must be more thorough, and "actual malice may be inferred when the investigation . . . was grossly inadequate in the circumstances."

In the instant case, defendants relied solely upon individuals likely to bear resentment toward the petitioner, as above-noted, and misstated public records and private documents. The most glaring example of the latter is found from the article's accusation that petitioner had been surreptitiously "taking as much as $30,000.00 per year in legal and consulting fees" from former associates of the Navy, in the operations of a small corporation known as All-Nav, Inc. This information was ostensibly obtained from the dissidents above mentioned, and a pro-forma balance sheet of the corporation. The pro-forma balance sheet was designated as such, but not dated. It projected salaries of officers of the Corporation at $30,000.00 per year. It was never implemented, officers never received salaries, and peti-

tioner's legal fees to the corporation averaged $500.00 per year. Yet, the aforesaid defamatory contention was published by the defendants. At the trial, they would explain that defendant JAQUES did not understand what the pro-forma balance sheet meant.

It is incredible to believe that this sophisticated investigative reporter would be ignorant of the nature of a pro-forma balance sheet and, if indeed he did not know its purpose, would have made no inquiry as to the nature of such a document. Further, although Defendant JAQUES knew that the dissidents who had showed him the pro-forma balance sheet were antagonistic toward the petitioner he did not go to any other member of the All-Nav Corporation to confirm that document or ascertain its meaning.

Defendants based other portions of their article upon unconfirmed rumor without any effort to substantiate the statements involved. Thus, their contentions of petitioner's income and earnings while he served as attorney for the several public entities previously discussed, and the inference that he had misused his office for personal gain, were based upon such unconfirmed rumor. The serious charge that petitioner permitted the use of his office for "rump" sessions, of the City Council, known by Defendant BLOCK to be illegal was not supported by any evidence, and the appellate Court's decision referring to *public* agenda sessions of the Council, do not support the inference of "rump" sessions inferred by that Court. However viewed, the total evidence of this case clearly demonstrates defendants' "actual malice" within the purview of the *New York Times v. Sullivan* doctrine.

CONCLUSION.

Petitioner was neither a public official or public figure within any of the guidelines or tests previously defined by

this Honorable Court. Even so, defendants' *known falsity* and *reckless disregard for the truth*, as to their defamatory publications, was graphically demonstrated by the evidence presented to the Trial Court.

Defendants' publications were contrived attacks upon petitioner's reputation and occupation. Their investigation was designed to ferret out every specious rumor and adverse opinion of the petitioner possible, for its indiscriminate publication.

Petitioner respectfully requests that a writ of certiorari issue from and by this Honorable Court, to review the decision and opinion of the California Appellate Court, as affirmed by the California Supreme Court, and that the decision and opinion of the California Appellate Court, as affirmed by the California Supreme Court, be summarily reversed, with instructions to remand the case to the California Trial Court for a trial on the merits, as to all issues of the case, and for such other and further orders and directions as this Honorable Court deems may be just in the premises.

Respectfully submitted,

JACQUE BOYLE,

Attorney for Petitioner.

APPENDIX A.

Judgment.

Superior Court of California, County of Monterey.

Saul M. Weingarten, Plaintiff, vs. Paul Block, et al., Defendants. No. M-5520.

The above-entitled cause came on regularly for trial before the undersigned on November 15, 1976. Plaintiff appeared in person and by JACQUE BOYLE. Defendants appeared in person and by MYRON E. ETIENNE, Jr., Attorney at Law, of the law firm of NOLAND, HAMERLY, ETIENNE & HOSS. A jury was regularly sworn and impaneled. After presentation of evidence, oral and documentary, on behalf of the Plaintiff, the Defendants thereupon moved for a nonsuit. The Court being advised in the premises and good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That Defendants have judgment in the within action, that Plaintiff takes nothing by his action; and that Defendants have his costs of suit herein in the amount of $2,009.20.

DATED: Jan. 7, 1977.

/s/ Edward P. Fogg
Judge of the Superior Court

APPENDIX B.

Findings of Fact and Conclusions of Law.

In the Superior Court of the State of California, County of Monterey.

Saul M. Weingarten, Plaintiff vs. Paul Block, et al., Defendants. Case No. M 5520.

The above-entitled matter came on regularly for trial in the above entitled court on November 24, 1976, the Honorable Edward P. Fogg presiding with a jury. Myron E. Etienne, Jr., Attorney at Law of the law firm Noland, Hamerly, Etienne & Hoss, represented the Defendants; the Plaintiff was represented by Jacque Boyle.

Said cause having been heard, evidence both oral and documentary having been introduced, and arguments having been presented.

THE COURT FINDS AND CONCLUDES AS FOLLOWS:

1. Plaintiff Saul M. Weingarten served as City Attorney for the city of Seaside for a period of 15 years, from 1955 to 1970.

2. Plaintiff Saul M. Weingarten served as City Attorney for the City of Gonzales for a period of 19 years, from 1954 to 1973.

3. Plaintiff Saul M. Weingarten served as interim City Attorney for the City of Pacific Grove for a period of 1 year, from 1954 to 1955.

4. Plaintiff Saul M. Weingarten has served continuously as attorney for the Redevelopment Agency of the City of Seaside from 1963 to the present. Although said agency has been served by other counsel, Plaintiff has been the only local counsel which has served the agency during that period of time. Plaintiff was the City Attorney of Seaside at the time the agency was formed and was instrumental in forming

the agency, in getting the federal funding for the agency, and initiating and bringing to fruition a series of redevelopment projects in the City. Since the formation of the City of Seaside in the mid-1950's, the Redevelopment Agency has played an important role in providing to Seaside utilities, improvements and services which did not exist in Seaside prior to its incorporation. Plaintiff has played an active and important role in the Redevelopment Agency since its inception in 1963, and Plaintiff has received much publicity concerning his role in the Redevelopment Agency throughout the history of said agency.

5. Prior to publication of the subject articles in 1971, Plaintiff Saul M. Weingarten had held the following public offices:

a. Member of the Democratic Central Committee for Monterey County for approximately 10 years, beginning in 1955;

b. Member of the State Central Committee for 2 years, approximately 1958 and 1959.

6. Plaintiff Saul M. Weingarten had been a candidate for the public office of State Assembly in 1958, and Plaintiff's name was suggested by Democratic organizations as a candidate for the United States Congress and the California State Senate.

7. Plaintiff Saul M. Weingarten has pleaded in the verified Fifth Amended Complaint that he was "public attorney" and other facts which are the equivalent thereof, as follows:

a. Page 3, line 21;
b. Page 8, line 11;
c. Page 11, line 19;
d. Page 16, line 11;
e. Page 19, line 18;

f. Page 23, line 12;

g. Page 25, line 23;

h. Page 29, line 6.

8. Plaintiff Saul M. Weingarten's activities as City Attorney, attorney for the Redevelopment Agency, and civic leader in the community of Seaside and in the Monterey Peninsula area received extensive publicity in the *Monterey Peninsula Herald* newspaper from 1967 to 1971.

9. Because of his public stature, Plaintiff Saul M. Weingarten had significantly greater access to the channels of communication than does an ordinary private person.

10. At the time of the publication of the subject articles in 1971, Plaintiff Saul M. Weingarten had assumed a role of especial prominence in the affairs of the community of Seaside, and occupied a position of persuasive power and influence which caused him to attain pervasive fame and notoriety in the community of Seaside.

11. Plaintiff Saul M. Weingarten was discharged from his position of City Attorney for the City of Seaside in October of 1970 by vote of the Seaside City Council; thereafter, Plaintiff Saul M. Weingarten served as the attorney for the Seaside Citizens For Better Government, a corporation organized to initiate a recall of the members of the Seaside City Council who had voted for Plaintiff Saul M. Weingarten's discharge. Relative to the recall movement in Seaside, Plaintiff also represented Bernard J. Dolan, Jr., in an action filed against the City of Seaside in Monterey County Superior Court, No. M 5020, entitled *Dolan vs. City of Seaside*. The recall movement in Seaside generated controversy in the community and received extensive publicity in the local newspaper.

12. The recall movement, organized and promoted by the corporation which Plaintiff Saul M. Weingarten repre-

sented, successfully recalled from office three of four members of the Seaside City Council who had voted to discharge Plaintiff Saul M. Weingarten as City Attorney.

13. By his representation of the recall organization, Plaintiff Saul M. Weingarten voluntarily injected himself into the public controversy in Seaside regarding the recall election and thereby invited public attention and comment.

14. After the discharge of Plaintiff Saul M. Weingarten from the position of City Attorney for the City of Seaside in October of 1970, that position remained vacant and legal services were performed for the City by several interim City Attorneys. In August of 1971, after completion of the recall election, the City of Seaside resumed its search for a City Attorney. On August 5, 1971, an article appeared in the *Monterey Peninsula Herald* indicating that the Seaside City Council was resuming the search for a City Attorney. On September 9, 1971, the date of the publication was vacan and applications for the position were being solicited by the City of Seaside. The position of City Attorney in Seaside was a matter of lively public interest throughout 1971 and remained so on September 9, 1971; propositions for further change were abroad, and public interest in filling the vacancy created by the firing of Plaintiff continued strong throughout 1971.

15. Plaintiff Saul M. Weingarten was drawn into the public controversy in Seaside regarding the filling of the vacancy in the City Attorney position because of Plaintiff's former position as Seaside City Attorney for 15 years, and because of his involvement as attorney for the organization which recalled three of the four members of the Seaside City Council who voted to discharge him from the position of City Attorney.

16. The comments regarding Plaintiff Saul M. Weingarten which appear in the subject articles relate to one or

more of the following issues:

a. Plaintiff Saul M. Weingarten's involvement in the public controversy surrounding his dismissal as City Attorney and the filling of the vacancy created thereby;

b. Plaintiff Saul M. Weingarten's involvement in the movement to recall the members of the Seaside City Council who voted to discharge him;

c. Plaintiff Saul M. Weingarten's fitness to perform the services of City Attorney of the City of Seaside or attorney for the Redevelopment Agency and to hold a position of public service and esteem in the community of Seaside.

Any findings of fact stated herein as a conclusion of law shall be deemed as such and any conclusion of law stated as a finding of fact shall be deemed incorporated in these findings.

From these findings, the court makes the following

CONCLUSIONS OF LAW

1. Plaintiff Saul M. Weingarten was a public official at the time of publication of the subject articles.

2. Plaintiff Saul M. Weingarten was a public figure for all purposes and had attained pervasive fame and notoriety in the community of Seaside at the time of publication of the subject articles.

3. Insofar as Plaintiff Saul M. Weingarten has injected himself by his own actions into the governmental affairs of the City of Seaside, and was drawn into the governmental affairs of the City of Seaside by the public's interest in his involvement therein, Saul M. Weingarten was a public figure for the purposes of his involvement in the governmental affairs of the City of Seaside.

4. Plaintiff Saul M. Weingarten has the burden of proof to show that any defamatory material published in the subject articles was false and that Defendants knew it to be

false, or entertained serious doubts as to its truth.

Let Judgment be entered accordingly.

Dated: Feb. 8, 1977

/s/ Edward P. Fogg

Honorable Edward P. Fogg

APPENDIX C.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, First Appellate District, Division Two.

Saul M. Weingarten, Plaintiff and Appellant, v. Paul Block, Monterey Peninsula Herald Co., a California corporation, Toledo Blade Company, an Ohio corporation, Richard B. Gifford and Milton Jaques, Defendants and Respondents. 1 Civil No. 42705, (Sup. Ct. No. M 5520).

Filed: Feb 14, 1980.

The major questions presented by this appeal[1] are whether the trial court properly: 1) found that plaintiff, Saul M.Weingarten (Weingarten), the former city attorney of Seaside and local attorney for its redevelopment agency, was a "public official" and "public figure" within the rule of New York Times Co. v. Sullivan, 376 U.S. 254, and Curtis Publishing Co. v. Butts, 388 U.S. 130; 2) granted a nonsuit at the conclusion of Weingarten's evidence before a jury on his complaint for libel, conspiracy to libel, intentional infliction of emotional distress, and interference with economic advantage against the owners and publishers of the Monterey Peninsula Herald and other defendants[2] (hereafter collectively Block). For the reasons set forth below, we have concluded that the judgment must be affirmed.

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[1]The notice of appeal indicates that it is also taken from the order of November 24, 1976, which granted the defense motion for a court determination of the application of the New York Times privilege. As this order was merged in the judgment, it is not separately appealable and that appeal must be dismissed.

[2]The defendants on appeal are Paul Block, the major stockholder; Toledo Blade Company, another owner; Monterey Peninsula Herald Co., the publisher, B. Gifford, the manager of the Monterey Herald; and M. Jaques, the author of the articles.

The instant case hinges on the application of the qualified constitutional privilege based on the First Amendment of the U.S. Constitution and extended to state court libel actions by the Fourteenth Amendment, as first set forth in New York Times Co. v. Sullivan, supra, 376 U.S. 254. The rule established that in a defemation action brought by a public official, the plaintiff must prove by clear and convincing evidence that the publication was false, and that the defendant published with "actual malice" (p. 280), defined as publishing "with knowledge that it was false or with reckless disregard of whether it was false or not" (p. 280). (See also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 490).

The New York Times rule was extended beyond "public officials" to "public figures" (Curtis Publishing Co. v. Butts, supra, 388 U.S. 130, and its companion case, Associated Press v. Walker, 388 U.S. 130). In Rosenbloom v. Metromedia, 403 U.S. 29, the U.S. Supreme Court held that a libel plaintiff's status as a public person was not determinative of the availability of the qualified constitutional privilege; the privilege was extended to all discussion and communication concerning matters of public or general concern. Subsequently, in Gertz v. Welch, Inc., 418 U.S. 323, the U.S. Supreme Court held that the Rosenbloom rule was not constitutionally required, and returned to a distinction between "public persons" (including both "public officials" and "public figures") and "private individuals."

Preliminarily, we dispose of Weingarten's procedural contentions. Weingarten argues that the court abused its discretion by permitting Block to amend their answers at the time of trial to include an allegation that he was a "public official." The answers alleged as an affirmative defense that Weingarten was a "public figure." The trial court has discretion to allow an amendment to any pleading in fur-

therance of justice at any time before or after the commencement of trial (Code Civ. Proc., §§473, 576). Liberality in permitting amendments is the rule (Greenberg v. Equitable Life Assur. Society, 34 Cal.App.3d 994). As a matter of policy, the ruling of the trial court will be upheld, unless a manifest or gross abuse of discretion is shown (Bedolla v. Logan & Frazer, 52 Cal.App.3d 118, 135).

As the court observed here, Weingarten knew from the beginning that the New York Times privilege was the major issue. Weingarten's complaint was pled in the language of New York Times and in his trial brief, he referred to himself as a "public official." Accordingly, we conclude that the court did not abuse its discretion in allowing the amendment of the answer.

Weingarten next argues that the trial court erred by making a determination of the public official/public figure issue prior to the commencement of the jury trial. In Rosenblatt v. Baer, 383 U.S. 75, at page 88, the U.S. Supreme Court indicated that "as is the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show [plaintiff] to be a 'public official.' " The federal authorities agree that the question is a mixed one of law and fact to be preliminarily determined by the trial court (Meeropol v. Nizer (2d Cir. 1977) 560 F.2d 1061; Rosanova v. Playboy Enterprises, Inc. (S.D. Ga. 1976) 411 F.Supp. 440; Hotchner v. Castillo-Puche (S.D.N.Y. 1975) 404 F.Supp. 1041; rev. jury verdict (2nd Cir. 1977) 551 F.2d 910). Such a procedure is consistent with that followed in this state for the determination of privilege. In any event, Evidence Code section 320 leaves the order of proof in the discretion of the trial court "[e]xcept as otherwise provided by law." We conclude that the trial court properly determined the issue before submitting the case to the jury.

In this context, we turn to the facts as found[3] by the court.

Weingarten served as city attorney for the City of Seaside for 15 years, from 1955 to 1970; he also served as city attorney for the City of Gonzales for 19 years, from 1954 to 1973, and as interim city attorney for the City of Pacific Grove for one year, from 1954 to 1955. In addition, Weingarten has served continuously as attorney for the Redevelopment Agency of the City of Seaside (Redevelopment Agency) from 1963 through 1977. Although the Redevelopment Agency was served by other counsel, Weingarten has been the only local counsel. Weingarten was the city attorney of Seaside at the time the Redevelopment Agency was formed and was instrumental in forming the agency, in getting the federal funding and initiating and bringing to fruition a series of redevelopment projects in the city. Since the formation of the City of Seaside in the mid-1950's, Redevelopment Agency has played an important role in providing utilities, improvements and services which did not exist in Seaside prior to its incorporation. Weingarten has played an active and important role in the Redevelopment Agency since its inception in 1963, and has received much publicity concerning his role in the Redevelopment Agency throughout its history.

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[3]As findings of fact are not necessary on a nonsuit (Mosk v. Scheinberg, 52 Cal.App.2d 154, 157), we treat the findings as pertaining to the court's pretrial determination that Weingarten was a public official and a public figure. We also need not discuss in detail Weingarten's contention that the court abused its discretion in filing the findings after the judgment. The record indicates that Weingarten made no objection to the proposed findings and conclusions. The judgment was entered on January 18, 1977; the findings and conclusions on February 11, nunc pro tunc as of January 18, 1977. The court had authority to do so and Weingarten was not prejudiced thereby (Norton v. City of Pamona, 5 Cal.2d 54, 62-63; Kaliterna v. Wright, 94 Cal.App.2d 926, 935; Code Civ. Proc., §473).

Prior to publication of the subject articles[4] in 1971, Weingarten was a member of the Democratic Central Committee for Monterey County for approximately 10 years, and a member of the State Central Committee for two years. In 1958, Weingarten was a candidate for the public office of State Assembly and his name was suggested by Democratic organizations as a candidate for the United States Congress and the California State Senate.

Weingarten pled in his fifth amended complaint that he was "public attorney." His activities as city attorney, attorney for the Redevelopment Agency, and civic leader in the community of Seaside and in the Monterey peninsula area received extensive publicity in the Monterey Peninsula Herald newspaper from 1967 to 1971. Because of his public stature, Weingarten had significantly greater access to the channels of communication than does an ordinary private person.

At the time of the publication of the subject articles in 1971, Weingarten had assumed a role of especial prominence in the affairs of the community of Seaside, and occupied a position of persuasive fame and notoriety in the community of Seaside. Weingarten was discharged from his position as city attorney for the City of Seaside in October 1970 by vote of the Seaside city council. Thereafter, he served as the attorney for the Seaside Citizens For Better Government, a corporation organized to initiate a recall of the members of the Seaside city council who had voted for his discharge. In relation to the recall movement in Seaside, Weingarten also represented Bernard J. Dolan, Jr., in an

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[4]The publications involved are the story published on September 9, 1971, set forth in Appendix A; the editorial on September 14, 1971, quoted in footnote 6 below, and the brief news story concerning Weingarten's taxes published on October 1, 1971. As the court conceded that the latter contained no defamatory material we need not quote it.

action filed against the City of Seaside in Monterey County Superior Court, No. M 5020, entitled Dolan v. City of Seaside. The recall movement in Seaside generated public controversy in the community and received extensive publicity in the local newspaper.

The recall movement, organized and promoted by the corporation which Weingarten represented, successfully recalled from office three of four members of the Seaside city council who had voted to discharge him. By his representation of the recall organization, Weingarten voluntarily injected himself into a public controversy in Seaside regarding the recall election and thereby invited public attention and comment.

After the discharge of Weingarten from the position of city attorney in October 1970, that position remained vacant and legal services were performed for Seaside by several interim city attorneys. In August of 1971, after completion of the recall election, the City of Seaside resumed its search for a city attorney. On August 5, 1971, an article appeared in the Monterey Peninsula Herald indicating that the Seaside city council was resuming the search for a city attorney. On September 9, 1971, the date of the publication of the first subject article, the Seaside city attorney position was vacant and applications for the position were being solicited by the City of Seaside. The position of city attorney in Seaside was a matter of lively public interest throughout 1971 and remained so on September 9, 1971. Propositions for further change were abroad, and public interest in filling the vacancy created by the firing of Weingarten continued strong throughout 1971.

Weingarten was drawn into the public controversy in Seaside regarding the filling of the vacancy in the city attorney position because of his former position as Seaside city attorney for 15 years, and because of his involvement

as attorney for the organization which recalled three of the four members of the Seaside city council who had voted to discharge him.

The comments about Weingarten which appeared in the subject articles relate to the following issues: 1) Weingarten's involvement in the public controversy surrounding his dismissal as city attorney and the filling of the vacancy created thereby; 2) Weingarten's involvement in the movement to recall the members of the Seaside city council who voted to discharge him; 3) Weingarten's fitness to perform the services of city attorney of the City of Seaside or attorney for the Redevelopment Agency.

The above findings were supported by substantial evidence. The court took judicial notice of a voluminous file of newspaper articles concerning the Seaside city council and Weingarten from 1968 to 1971.

In Rosenblatt v. Baer, supra, 383 U.S. 75, which involved the former supervisor[5] of a county recreation area, the U.S. Supreme Court, at page 84, rejected state law standards as the basis for determining who is a public official. The court then indicated, at page 85, that it need not precisely define the term for the purpose of that case, and then stated at pages 85-86, and 87: "The motivating force for the decision in New York Times was twofold. We expressed 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, *and* that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' 376 U.S., at 270.

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[5]The court, at pages 87-88, acknowledged that the plaintiff might be a public official but reserved the question for the trial court if a retrial were sought. In Henry v. Collins, 380 U.S. 356, a per curiam opinion, the U.S. Supreme Court assumed that one of the defendants, a county attorney, was a "public official" within the New York Times rule.

(Emphasis supplied.) There is, first, a strong interest in debate on public issues, and, second, *a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues*. Criticism of government is at the very center of the constitutionally protected area of free discussion. *Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized*. It is clear, therefore, that *the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs*.

"This conclusion does not ignore the important social values which underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of New York Times is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation. *Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in New York Times are present*[12] *and the New York Times malice standards apply*."[13] (Emphasis partially added.)

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We are treating here only the element of public position, since that is all that has been argued and briefed. We intimate no view whatever whether there are other bases for applying the New York Times standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust him-

self into the vortex of the discussion of a question of pressing public concern. Cf. Salinger v. Cowles, 195 Iowa 873, 889, 191 N.W. 167, 173-174 (1922); Peck v. Coos Bay Times Publishing Co., 122 Ore. 408, 420-421, 259 P. 307, 311-312 (1927); Coleman v. MacLennan, 78 Kan. 711, 723-724, 98 P. 281, 285-286 (1908); Pauling v. News Syndicate Co., 335 F.2d 659, 671 (C. A. 2d Cir. 1964)."

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It is suggested that this test might apply to a night watchman accused of stealing state secrets. But a conclusion that the New York Times malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation. *The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.*"

In Gertz v. Welch, supra, 418 U.S. 323, the court, in distinguishing between private and public individuals, observed at pages 343-345: "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

"More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. *An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties.* As the Court pointed out in

Garrison v. Louisiana, 379 U.S. 64, 77, *the public's interest extends to 'anything which might touch on an official's fitness for office*. . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.' " (Emphasis added.)

Weingarten's activities, set forth in the findings summarized above, indicate all of the Rosenblatt and Garrison criteria were met. As city attorney and attorney for the Redevelopment Agency, he had substantial control over the conduct of governmental affairs of Seaside. After his discharge and the recall, the public had an independent interest in anything that might touch on his fitness for that office and his continued services to the Redevelopment Agency.[6]

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[6]This was the thrust of Block's following editorial published on September 14, 1971:

THE WEINGARTEN CASE OUT IN THE OPEN

The point-by-point revelation in last Thursday's Herald of the prolific real estate and legal practice maneuverings of former Seaside City Atty. Saul M. Weingarten should prompt that city's urban redevelopment agency — which continues to retain him as counsel — to reflect on the type of advice it may be getting.

In all fairness to Weingarten, he has been credited with helping direct some of Seaside's major accomplishments in making the difficult transition from a World War II boom town into an orderly residential city. But while Saul Weingarten was being good to Seaside, Seaside certainly was being good to Saul Weingarten.

During his 15 years of part-time public service, according to The Herald's examination of the record, he amassed a fortune valued at $1.5 million. He earned more than $50,000 in some years for his public employment as both city attorney and legal counsel for the redevelopment agency. The redevelopment plum alone has paid more than $41,000 a year.

During all this profitable period, Weingarten was working his way in and out of various legal predicaments involving charges of negligence, malpractice and fraud from which he never has been completely exonerated.

It was this questionable record and other dubious activities that finally provoked the former city council of Seaside to fire him as city attorney. In retrospect, the published record certainly vindicates the wisdom of that council's action.

Needless to say, these included his involvements in matters relating to real property and whether or not he had misused either public trust for his own benefit or that of his personal clients. We conclude that an appropriate balancing of freedom of expression against sanctity of reputation in the instant case requires the conclusion reached by the trial court, namely, that Weingarten was a "public official" within the meaning of New York Times and Rosenblatt, both supra.

We note that the authorities in other jurisdictions agree that city attorneys or attorneys performing similar duties are "public officials" for the purpose of the New York Times rule (Finkel v. Sun Tattler Co., Inc. (Fla.App. 1977) 348 So.2d 51 (former city attorney); Frick v. McEldowney (1971) 275 N.E.2d 337 (attorney employed by a town to render legal opinions on matter of town interest); Tunnell v. Edwardsville Intelligencer, Inc. (1968) 241 N.E.2d 28, rev. on other grounds, 252 N.E.2d 535; Ewald v. Roelofs (1970) 256 N.E.2d 89 (municipal attorney conceded the issue)).[7]

But incomprehensible as it may seem, the urban redevelopment agency — whose members are appointed by one of Weingarten's legal clients, Mayor Lou Haddad — has never seen fit to do anything about the recurring difficulties in which their chief adviser is from time to time involved.

The fact that Weingarten's brushes were civil rather than criminal might work in his behalf were it not that the complaints against him so directly reflect upon his integrity as a public attorney. The fact remains that Seaside's important urban redevelopment program is officially represented by an attorney whose standard of ethics has been tried and found badly wanting.

Whatever the agency does at this late date, it will not be able to eradicate the sorry public record of this case, which is now completely out in the open. In most cities, a record similar to Weingarten's would have been cause for immediate dismissal, or at least suspension.

In Seaside, so far, only four city councilmen had the courage to do anything about this mess — and three of them were subsequently repudiated at the polls for their judgment.

[7]Zeck v. Spiro (1966) 276 N.Y.S.2d 395, the only contrary authority (attorney for a sewer district not a public official) turned on the finding that the statement did not involve official conduct rather than the status of the individual.

As since the filing of the briefs in this case the U.S. Supreme Court decided Wolston v. Reader's Digest Assn., Inc., 61 L.Ed.2d 450, and Hutchinson v. Proxmire, 61 L.Ed.2d 411 (both decided June 26, 1979), we are constrained to discuss the question of whether Weingarten also was a "public figure." The basis for the extension of the New York Times privilege to the libel claims of public figures was stated in the plurality opinion in Curtis Publishing Co. v. Butts, supra, 388 U.S., pages 147-148, as follows: "From the point of view of deciding whether a constitutional interest of free speech and press is properly involved in the resolution of a libel question a rational distinction 'cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of . . . policy will be less important to the public interest than will criticism of government officials.' Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188, 196."

In his concurring opinion, Chief Justice Warren said: "Viewed in this context, then, it is plain that although they are not subject to the restraints of the political process, 'public figures,' like *'public officials,' often play an influential role in ordering society. And surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials,' The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which*

society can attempt to influence their conduct'' (p. 164). (Emphasis added.)

In Gertz v. Welch, supra, 418 U.S. 323, the court noted at page 345: ''Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. *More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.* In either event, they invite attention and comment'' (emphasis added).

The facts as found by the trial court here indicate that Weingarten thrust himself to the forefront of the public controversy[8] that arose around his termination and was actively involved in influencing its resolution by his involvement in the recall and his continuing representation of the Redevelopment Agency as its chief local counsel. By such voluntary and active participation, he relinquished his in-

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[8]Wolston v. Reader's Digest Association, supra, 61 L.Ed.2d 450, is distinguishable. Wolston, who had been interrogated about the activities of Soviet intelligence agents in the United States, failed to respond to a grand jury subpoena, subsequently pled guilty to contempt charges, and was sentenced. These proceedings received considerable newspaper publicity but Wolston then returned to relative obscurity until 15 years later when a publisher named him as a Soviet agent. In holding that Wolston was not a public figure, the U.S. Supreme Court said at page 460: ''Petitioner's failure to appear before the grand jury and citation for contempt no doubt were 'newsworthy,' but the simple fact that these events attracted media attention also is not conclusive of the public figure issue. A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.''

terest in the protection of his own name.[9] Further here, since Weingarten earned substantial amounts from his public assignments, there was sufficient concern about specific public expenditures to make him a public figure. Hutchinson v. Proxmire, supra, 61 L.Ed.2d 411, is therefore inapposite. In Hutchinson, a scientist who engaged in federally funded research received the "Golden Fleece Of The Month" award bestowed by a U.S. Senator. In rejecting a contention that Hutchinson was a limited purpose public figure, the court said at page 431: "Hutchinson did not thrust himself or his views into public controversy to influence others. Respondents have not identified such a particular controversy; at most, they point to concern about general public expenditures. But that concern is shared by most and relates to most public expenditures; it is not sufficient to make Hutchinson a public figure. If it were, everyone who received or benefited from the myriad public grants for research could be classified as a public figure — a conclusion that our previous opinions have rejected. The 'use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area.' Time, Inc. v. Firestone, supra, at 456, 47 L.Ed.2d 154, 96 S.Ct 958."

We hold that the trial court also properly concluded that Weingarten was a public figure.

Next, we turn to Weingarten's contention that the trial court applied the wrong standard in granting the nonsuit.

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[9]We agree with the view recently expressed by Division One of this court in Franklin v. Benevolent etc. Order of Elks, 97 Cal.App.3d 915, at pages 928-930, that the broader definition previously suggested by this court in Montandon v. Triangle Publications, Inc., 45 Cal.App.3d 938, 948, has been superseded by Gertz, supra, 418 U.S. 323, Time, Inc. v. Firestone, 47 L.Ed.2d 154, and Wolston, supra.

He asserts that following the concurring opinion of Justice Wright in Wasserman v. Time, Inc. (D.C. Cir. 1970) 424 F.2d 920 (cert. den. 398 U.S. 940), the trial court judged the credibility of witnesses and drew its own inferences from the evidence. The record, however, indicates that the court followed the more stringent rule of Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael (9th Cir. 1974) 492 F.2d 438, which held that all inferences must be drawn in favor of the plaintiff.

We acknowledge that the Wasserman rule was followed in Bon Air Hotel, Inc. v. Time, Inc. (5th Cir. 1970) 426 F.2d 858, 864-865. However, we find the reasoning of the Ninth Circuit persuasive. Justice Duniway said in Guam Federation, supra, at page 441: "When civil cases may have a chilling effect on First Amendment rights, special care is appropriate. Thus, a judicial examination at these stages of the proceeding, closely scrutinizing the evidence to determine whether the case should be terminated in a defendant's favor, provides a buffer against possible First Amendment interferences. The Supreme Court has instructed trial courts to 'examine for [themselves] the statements in issue and the circumstances under which they were made to see . . . whether they are of character which the principles of the First Amendment . . . protect.' To be unprotected, actual malice must be shown with convincing clarity.' New York Times, supra, 376 U.S. at 285-286, 84 S.Ct. at 728-729.

"However, with respect, we are not persuaded by the second phase of Judge Wright's analysis in Wasserman which suggests that in deciding these motions, the trial court should judge the credibility of witnesses and draw its own inferences from the evidence. We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed verdict, or a motion for a judgment notwithstanding the verdict is made

is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.

"The *standard* against which the evidence must be examined is that of New York Times and its progeny. But the *manner* in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury."

As the Ninth Circuit rule is also in accord with the usual rule followed in this state for nonsuits, we conclude that the trial court applied the correct standard.

Weingarten concedes that he must prove not only that the publication was false but that it was knowingly so or was circulated with reckless disregard for its truth or falsity (Cox Broadcasting Corp. v. Cohn, supra, 420 U.S., p. 490), by clear and convincing evidence (New York Times v. Sullivan, supra, 376 U.S. 254).

"Reckless disregard 'cannot be fully encompassed in one infallible definition'; rather, 'its outer limits [must] be marked out through case-by-case adjudication, ...' (St. Amant v. Thompson, supra, 390 U.S. 727, 730 [20 L.Ed.2d 262, 267].) It is clear, however, that it involves a stringent and subjective standard. It is not measured by whether a reasonably prudent person would have published, or would have investigated before publishing. Rather, there must be sufficient evidence to permit an inference that the defendant

must have, in fact, subjectively entertained serious doubts as to the truth of his statement. (St. Amant v. Thompson, supra, 390 U.S. at p. 731 [20 L.Ed.2d at p. 267]; Alioto v. Cowles Communications, Inc., supra, 519 F.2d 777, 779; Montandon v. Triangle Publications, Inc. (1975) 45 Cal.App.3d 938, 947 [120 Cal.Rptr. 186], cert. den., 423 U.S. 893 [46 L.Ed.2d 126, 96 S. Ct. 193].) Actual malice, under New York Times, concentrates on the defendant's attitude toward the truth or falsity of the material published, and does not focus on the defendant's attitude toward the plaintiff. (Cantrell v. Forest City Publishing Co. (1974) 419 U.S. 245, 251-252 [42 L.Ed.2d 419, 426, 95 S.Ct. 465]; Carson v. Allied News Co., supra, 529 F.2d 206, 214.) Where the defamatory statements made by the defendant do not involve an element of 'hot news' and the need for expeditious release is not present, reckless disregard for the truth may be evidenced in part by failure to investigate thoroughly and verify the facts.'' (Widener v. Pacific Gas & Electric Co., 75 Cal.App.3d 415, 434.)

Viewing the record in favor of Weingarten in the light of his burden of proof as to Block's attitude toward the truth or falsity of the material published, the following pertinent facts appear: Block actively took over management of the Herald around August 1970, and changed the editorial staff. After the change, the Herald opposed the recall.

L. N. Haddad, who was the Mayor of Seaside from 1966 to 1972, testified that in 1970, before Weingarten was fired as city attorney, he was contacted by Block. Block wanted to know why Haddad had so strongly defended Weingarten, and urged Haddad to join the other members of the city council and fire Weingarten as city attorney.

Block had become aware of Weingarten and his activities after conversations with people in Seaside and after receiving letters from Oliver Murray, one of the recalled city

council members. Block also received copies of some of the documents in Parker v. Weingarten. In this matter,[10] Mrs. Parker was awarded damages for breach of trust and malpractice as Weingarten's actions caused her to lose her $4,045 equity in a parcel of real property. She had sought his help to prevent foreclosure. Weingarten arranged the refinancing which included a $5,000 third deed of trust at 10 percent interest to Allnav, Inc., a real estate investment group. Weingarten was a founder and shareholder of Allnav, acted as its attorney, and became the trustee under the third deed of trust. He did not reveal his interest in, and activities for, Allnav to Mrs. Parker. In the transaction, he also acted as trustee for both Mrs. Parker and her son, although their interests were adverse. After a court trial awarding Mrs. Parker $21,301.78, she consented to a reduction to $12,880 to avoid a conditional order granting a new trial; the reduction eliminated $3,421.78 general damages and $5,000 exemplary damages for fraud. The case received extensive publicity at all stages and apparently was one of the factors that led to Weingarten's termination as city attorney.

Block requested that a reporter be sent on a special assignment from another of its papers, the Pittsburgh Press, which was then on strike. M. Jaques, a reporter with over 25 years of experience, arrived in Monterey late in the summer of 1971 and spent a month investigating the matter before deciding to write an article. He researched court records, deeds, the Seaside city budget, Redevelopment Agency records, the Monterey County Grantor-Grantee Index, the financial statements and records of Allnav Cor-

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[10]We have based our summary on the unpublished opinion of this court which slightly modified and affirmed the reduced judgment in favor of Mrs. Parker on November 4, 1969; the state Supreme Court subsequently denied a hearing.

poration, the Monterey Superior Court files, and the Herald "morgue."

In addition to the city manager, city officials and the recalled council members, Jaques talked to Mr. Hoss, who had represented Mrs. Parker, and one of Hoss's partners, Mr. Etienne. Jaques also interviewed: 1) Mrs. Schacht, who was the adverse party in another publicized case in which Weingarten was the defendant after he represented her former husband; 2) some of the dissident shareholders of Allnav who disagreed with Weingarten about its management and succeeded in dissolving the corporation; 3) the Black plaintiff in a housing discrimination action in which Weingarten represented the Oriental defendants; 4) Mrs. Charbonneau whose sale of her property to the Redevelopment Agency was delayed because Weingarten had an unrecorded deed to the property obtained in a judgment against the former owner.

Fred Sorri, who was city editor of the Herald for 1½ years and had been a reporter since 1955, was asked to give Jaques some background on Weingarten. Sorri indicated that Weingarten had done a good job and never lost a case for the city, survived all of the controversies with the city council, and was involved in the unpopular activity of obtaining property by eminent domain for the Redevelopment Agency. When Sorri indicated that Weingarten should be interviewed, Mr. Block said "No." In reply to a question on direct examination,[11] Sorri stated that Jaques had been brought out as a "hatchet man" for Block on the Weingarten story but he immediately qualified his answer to indicate that Block would not have brought Jaques out if Block had not had good reason to believe (from sources unknown to Sorri) that there was a story. Sorri's testimony thus estab-

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[11]Sorri was a witness for Weingarten.

lished Block's lack of malice toward Weingarten. Sorri's statement that there was no "hot news element" or "news hook" to the September 9, 1971, story, is also of little consequence, given the thorough and lengthy investigation conducted by Jaques.

Nor, contrary to Weingarten's contention, was there any requirement that Jaques also talk to him to obtain his version of the events described. Rosenbloom v. Metromedia, supra, 403 U.S. 29, specifically so held at page 56. Jaques was also not required to provide an objective picture (New York Times Company v. Connor (5th Cir. 1966) 365 F.2d 567, 576). Inaccuracies in reporting judicial proceedings do not constitute actual malice (Time, Inc. v. Pape, 401 U.S. 279). Factual error alone, also will not suffice (Fadell v. Minneapolis Star & Tribune Co., Inc. (7th Cir. 1977) 557 F.2d 107). Recklessness is not established by showing that the reporting in question was speculative or even sloppy (Oliver v. Village Voice, Inc. (S.D. N.Y. 1976) 417 F.Supp. 235, 238).

It may be argued that some of Block's activities were indicative of ill will toward Weingarten. Civil Code section 48a, subdivision 4(d), unlike the New York Times standard, includes in its definition of malice "hatred or ill will toward the plaintiff." However, under that section, such a state of mind does not constitute malice if occasioned by a good faith belief on the part of the defendant in the truth of the publication. Even under the New York Times standard, ill will does not constitute proof of knowledge of falsity (Hotchner v. Castillo-Puche, supra, 551 F.2d, p. 913).

An assertion that cannot be proved false cannot be held libelous (Gregory v. McDonnell Douglas Corp., 17 Cal.3d 596, 600-601). A writer cannot be sued for simply expressing his opinion of another person, however unreasonable

the opinion or vituperous the expression of it may be (Gertz v. Welch, supra, 418 U.S., pp. 339-400).

We turn in detail to the allegedly "false and reckless" statements in the order in which they appeared in the September 9 article of which Weingarten complains.

The reference to the possible return of Weingarten as city attorney for Seaside was not defamatory. In any event, Jaques indicated he based this statement on sources at City Hall and the city manager. Although the latter did not want to be quoted and did not remember making such a statement, Block's lack of malice is demonstrated by the legitimacy of the sources of information, as well as the extended controversy surrounding Weingarten's dismissal, the recall, and the length of time the city took to find a replacement.

As to the statement that the city attorney's position was a $20,000 a year part-time legal job, the record indicates that the statement was accurate as of the time of the search, although Weingarten had been paid around $10,000-$12,000 annually during his tenure.

As to the innuendos that Weingarten misused his public positions to amass a fortune, the record, admittedly, contains no evidence indicating that anything of the kind had in fact occurred. However, we are not dealing with the correctness of the statements made, but the means by which Jaques obtained the information and the basis for the statements. Even an author whose function is to gather facts need not necessarily verify his information (Fadell v. Minneapolis Star & Tribune Co., supra, 425 F.Supp., p. 1085). The record indicates that at the time of his investigation, Jaques had no reason to disbelieve any of his sources. Erhman and Murray both charged Weingarten with making unfair and illegal profits in certain real estate transactions. The First Amendment protects the reporting of charges

against a public official or figure "regardless of the reporter's private views regarding their validity. [Citations.] What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation. [Citation.] The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them" (Edwards v. National Audubon Society, Inc. (2d Cir. 1977) 556 F.2d 133, 120; Pierce v. Capital Cities Communications, Inc. (3d Cir. 1978) 576 F.2d 495, 498).

Jaques' admission that his use of the term "insider information . . . may have been incorrect," at most, is an indication of carelessness. Weingarten did not dispute the fact and the $1,500,000 estimate of his wealth, but indicated it was the result of some early and fortunate real estate investments. The statement that Weingarten "earned more than $50,000 in some years" from his public employment as both city attorney and legal counsel for the Redevelopment Agency, was apparently true as to one year, in which it is not disputed that Weingarten received over $40,000 from the Redevelopment Agency. Thus, the inference that these earnings occurred in more than one year is mere negligence.

As to Weingarten's "prolific real estate practice," the record indicates that Weingarten testified that "real property investments" were one of his activities. Jaques based his statement on the Grantor-Grantee Index, other official records, and a number of local attorneys who were identified. Several other attorneys named by Jaques were the source

of the statement that some "found difficult to follow in business transactions" Weingarten's recollections of earlier oral agreements.

As to the statements concerning Weingarten's relations with the 50 percent Black population of Seaside, the record indicates a number of instances where Weingarten's stand as city attorney or for the Redevelopment Ageny, was opposed by a segment of the Black community. For example, in 1969 the Redevelopment Agency was the defendant in a federal action charging racial discrimination brought by the Seaside Low Cost Housing Corporation which was represented by Mrs. Van Hook, the same attorney who represented the plaintiffs in the residential housing case discussed in the article. In 1969-1970, there was a controversy concerning the Seaside real estate disclosure ordinance as one council member believed it could be misused to foster racial discrimination. Jaques indicted that this portion of the article was based in part on a meeting he had with some of the dissident members of the Black community at the home of Mrs. Carey, one of the recalled city council members.

There was also no "deliberate falsehood or recklessness" in statements pertaining to Weingarten's conduct as an officer, shareholder, and attorney for Allnav, Inc. The proxy fight and subsequent dissolution of Allnav are not disputed. Jaques met with former Allnav associates Hartmann and Gravelle, who both believed at that time that Weingarten, who was in total control of the corporation's assets, had unjustifiedly taken $30,000 in fees. They described his activities, the mysterious disappearance and reappearance of some of the corporate records, and their reliance on the proforma balance sheet.

As to the comments and innuendos concerning the Schacht litigation, the record also indicates that Jaques and Block believed them to be true. Mrs. Schacht and her at-

torney, Mr. Shostak, told Jaques that Weingarten forced her to accept a reduction in the judgment against her former husband. Weingarten personally purchased $60,000 of Mr. Schacht's savings and loan association stock and made the availability of Mr. Schacht's Carmel Valley lots known to the Allnav investment committee. Weingarten had a power of attorney to sell or lease Mr. Schacht's Pebble Beach house and received Mr. Schacht's mail. The description of the Parker litigation also strikes us as an accurate one. As to the comments concerning the bar association, Mr. Etienne stated that at the time of the Parker case, as well as at the time of the instant trial, he believed Weingarten should have been disciplined by the bar association.

The statement that Weingarten's office "sometimes served as a meeting place for rump sessions of the City Council" was also substantially true. Jaques acquired this information from several named individuals and had it confirmed by others. Sorri stated in his depositions that when he covered Seaside city council meetings, he customarily attended semi-closed sessions of the council which preceded the regular meetings, with the understanding that he was not to directly quote anything that was said.

As to the statement "where there is smoke, there may be fire," the record merely indicates that at the trial five years later, the person to whom it was attributed did not remember making it at all. Jaques stated that the statement was attributable to that person, who was assured that he would not be mentioned in the article. Thus, there was no clear and convincing evidence of known falsity.

When the evidence adduced to show malice or recklessness in the instant case is measured against the clear and convincing standard, it is obvious that it meets none of the stringent requirements for actionable libel of a public official. Every statement has been traced to an identifiable

source. There was no evidence that any of the sources denied giving the questioned information to Jaques or that Jaques either knew or had clear grounds to suspect that the statements might be false. All that the evidence reveals is that Jaques relied on one or two persons for each statement; two sources did not remember the statements attributed to them; others were actively involved in the events described in the article and had a bias against Weingarten. None of the statements under the circumstances constituted "reckless disregard for the truth."

Although accuracy and objectivity in reporting are goals for which all responsible news media strive, the protection of the First Amendment is not limited to statements whose validity are beyond question or which reflect an objective picture of the reported events. While verification of the facts remains an important reporting standard, a reporter, without a "high degree of awareness of their probable falsity" may rely on statements made by a single source, even though they reflect only one side of the story without fear of libel prosecution by a public official (New York Times Company v. Connor, supra, 365 F.2d, p. 576).

We conclude therefore that the court properly granted the nonsuit as to the causes of action for libel. Weingarten acknowledges that if the libel count fails, the cause of action for intentional infliction of emotional distress must also fail. (Lerette v. Dean Witter Organization, Inc., 60 Cal.App.3d 573, 579.)

Weingarten's contention concerning the survival of the causes of action for conspiracy to commit libel is without merit. As Block's conduct was privileged under the *New York Times* rule, there was no wrongful act on which a conspiracy count could be based. (Agnew v. Parks, 172 Cal.App.2d 756, 762; Widdows v. Koch, 263 Cal.App.2d 228, 234.)

As to the cause of action for interference with prospective advantage, unjustifiable and wrongful conduct is also one of the requisite elements (Scott v. McDonnell Douglas Corp., 37 Cal.App.3d 277, 292). Thus, the nonsuit was also properly granted as to that cause of action.

The judgment of nonsuit is affirmed; the purported appeal from the order of November 24, 1976, is dismissed.

CERTIFIED FOR PUBLICATION.

TAYLOR, *P.J.*

We Concur:

ROUSE, *J.*

MILLER, *J.*

APPENDIX "A"

WEINGARTEN RETURN AS CITY ATTORNEY POSSIBILITY IN SEASIDE

By Milton Jaques

Herald Staff Writer

Seaside City Council, which fired City Atty. Saul M. Weingarten last year, may want to hire him back if applicants continue to shun the $20,000 a year part-time legal job.

That's the way some insiders in Seaside's gleaming and unpaid-for city hall view the desperate search to fill the vacant post.

A Sept. 15 target date for picking a successor may soon go down the drain, it was learned. Applications are coming in slowly, with fewer than 10 in hand.

Push Search

City Manager Milton Farrell is pushing the search throughout California. Realistically, however, he expects the successful candidate will probably be a lawyer who is now engaged in private practice on the Monterey Peninsula.

As the city's attorney since 1955, shortly after its incorporation, Weingarten had a hand in the rapid growth and development of the community outside the fence of Fort Ord.

There, in 15 years, he amassed a fortune valued at $1,500,000. He earned more than $50,000 in some years from his public employment as both city attorney and legal counsel for the Redevelopment Agency of the City of Seaside. The redevelopment plum has paid more than $41,000 a year.

After firing Weingarten last year, the city tried to hire a new attorney, but out of at least 40 applicants, not one

was engaged. Legal advice in the interim has been furnished by several local attorneys. The city looks upon the job as requiring about half the time of a busy lawyer.

Weingarten, at the same time he was guiding and advising the city with its problems, also engaged in a prolific real estate and legal practice. After leaving the Navy as an officer at the Postgraduate School in Monterey, he quickly gained a reputation for diligence and intelligence.

Later, some found him difficult to follow in business transactions, particularly in his recollections of earlier verbal agreements.

Backing

Although enjoying solid backing from Seaside Mayor Louis N. Haddad, whom he serves as personal attorney, also, Weingarten encountered considerable opposition from some segments of the local populace. Black residents were disturbed by his appearances in behalf of a local landlord against whom a civil rights discrimination case was brought by a black couple.

Minority groups equated Weingarten's public stance as a city attorney and as legal counsel to a federal housing program as requiring action in their behalf, instead of legal opposition.

Weingarten also antagonized former associates of the Navy with whom he had banded together to form a land development group known as All-Nav, Inc. The group, put together about 1960 as a small time and friendly operation, came upon hard times in the middle 1960s.

Dissidents waged a proxy fight in the tiny corporation of about 130 members, who bought stock at $10 a share. The dissidents took over the corporation after a number of land deals made by Weingarten turned sour and landed in court. The dissidents discovered that Weingarten had been taking

out as much as $30,000 a year in legal and consultant fees. This upset the naval people who thought they were part of a small, informal deal to make a little money in land, with no intention of paying big league salaries to officers. Weingarten shortly before his ouster was president, a member of the board and legal counsel to All-Nav, Inc.

As city attorney during Seaside's infancy, Weingarten is credited with helping direct the city's major accomplishments, in growing from a World War II boom town into an orderly residential and commercial city. He handled legal details for the capital improvement program, including the paving of streets, the $20 million urban renewal program, and construction of the city's gleaming offices at Harcourt avenue and Canyon Del Rey boulevard.

Surgery

The city council since it fired Weingarten has undergone radical surgery. Three of four members—Gerald McGrath, Oliver Murray and Pearl Carey—were retired in a recall movement. Only Councilman Stephen Ross of the group voting to oust Weingarten remains.

The urban redevelopment agency, composed of members recommended by the mayor and approved by the council, acts autonomously in selecting its own agency staff and legal counsel. A friendly council, of course, is likely to approve the mayor's selections.

A friendly city council, too, could go along with the mayor who was outvoted in his opposition to the ousting of Weingarten by last year's council.

Weingarten's biggest problem with combined public and private practice came in a series of suits brought against him over the past five years. Of these, only one had previously been disclosed in the press. In the legal battles, two court decisions ruled against Weingarten, and one, brought

against him for fraud and to set aside fraudulent conveyances, was settled in secret.

And although Haddad says Weingarten never lost a case while serving as city attorney, in his private practice, Weingarten's court record shows three substantial setbacks.

Actually, Seaside druggist Fred Mitchell says he bested Weingarten in a case involving the right of customers to park at the Fremont Pharmacy's curbside. In the dispute, it developed that the State of California, and not the city of Seaside, as represented by Weingarten, controlled the regulation of parking on the busy thoroughfare.

A 1965 suit brought by Mrs. Elizabeth L. Schacht of San Francisco against Weingarten probably set back the former Seaside city attorney as decisively as anything.

Secret Settlement

Tried in 1969 before a jury in superior court, it was settled secretly after a day and a half of testimony. It was learned that Weingarten paid between $40,000 and $50,000 to close the case.

He had been brought into court accused of helping John H. Schacht, formerly of Pebble Beach, skip town to avoid paying a $216,000 judgment to his former wife.

In 1964, Schacht liquidated his Monterey County assets and moved to Canada in the interval between Judge Anthony Brazil's announcement of the judgment from the bench, and the formal recording of ruling.

In attempting to find Schacht, investigators ran into Weingarten serving as a lawyer for him. Weingarten was accused of assisting in the rapid liquidation by personally buying $60,000 worth of savings and loan association stock from Schacht. He was also accused of getting All-Nav, Inc., the land development group, to purchase Schacht's two building lots in Carmel Valley.

Schacht handed the keys to his Pebble Beach house to Weingarten, with orders to lease or sell. Weingarten's Seaside office, which sometimes served as a meeting place for rump sessions of city council, became the "mail drop" for the vanished Schacht.

Weingarten was implicated in the case because the California Code for attorneys prohibits advising and assisting clients to avoid court judgments. Weingarten in his defense said Schacht had told him of intentions to appeal the judgment with a need for cash in case he had to comply with the court order.

Pleads 'Poor'

The wealthy Weingarten, who also owns two houses in Pebble Beach, including one he rents to Seaside City Manager Milton Farrell, pleaded poverty in seeking to pay the secret settlement.

After his first offer of $1,000 a month for 50 months was accepted, he returned with another offer of a flat $40,000, or a 20 per cent cut, for cash. This was also accepted.

Mrs. Diane Charbonneau, who lived on Mingo street in Seaside in the early 1960s with her four children, also fought Weingarten successfully. She retained control of her property through litigation after the urban redevelopment lawyer, using insider information on land sales, sought to claim it as his own.

Barred

A superior court judge cleared the way for Mrs. Charbonneau to sell her property to the redevelopment project, rejecting all claims of Weingarten to the property. The court barred Weingarten from interfering with the sale of her property.

Years earlier, Weingarten had obtained a sheriff's deed to the property in a judgment against a former owner. He

had not recorded the deed at the courthouse in Salinas, and a title search by Mrs. Charbonneau's attorney revealed that legal title had remained with a Southern California woman.

Complicating the legal case was the fact that Weingarten had also taken a third deed of trust against the property after he had served as Mrs. Charbonneau's attorney in a divorce. His fee was $250, plus $25 costs.

Third Case

The third losing case Weingarten encountered in his private practice involved charges of fraud, malpractice and negligence in his trusteeship of property on Casanova street, Monterey, on behalf of a widow.

Lawyers still argue whether the Seaside attorney was actually found guilty of fraud in the suit brought by Mrs. Marie Parker for the recovery of her property. The newspapers carried the story both ways.

Weingarten appealed Judge Hugh Donovan's ruling in superior court in Monterey County to the California Supreme Court, but to no avail. The only modification in the original ruling was a reduction in damages paid to the widow who had been wiped out of her $21,000 equity by the transactions of her attorney, her son, and his real estate partner.

The judge, horrified by the legal tangle, stated from the bench:

"You see, there is the viciousness of the whole thing. He (Weingarten) was acting for both parties with adverse interests. . .

"And I reluctantly, I assure I reluctantly rendered this judgment because I thought there was a violation of the State Bar Act there."

In searching for a new city attorney, the Seaside City Council will not have the advice and assistance of the bar association. The advice is sought, for instance, by the U.S.

Senate when it is asked to confirm presidential appointments to the federal bench.

Formal complaints lodged with the bar association against the Seaside public official have been turned aside as inconsequential. In private conversation, local attorneys admit they are aghast at the problems created for them by the antics of their colleagues in the bar.

"Sure, he's giving us a bad name," said one.

"Where there's smoke, there may be fire," one wise and judiciously-inclined older member observed.

The city council, meantime, hopes to proceed with filling the attorneyship, and has not barred Weingarten from further consideration.

APPENDIX D.

Court of Appeal of the State of California, in and for the First Appellate District, Division Two.

Saul M. Weingarten, Plaintiff and Appellant, vs. Paul Block, et al., Defendants and Respondents. 1/Civil No. 42705, Monterey Superior Court No. M5520.

Filed: Mar. 14, 1980.

By The Court:

Petition for Rehearing is denied.

ROUSE, *J. Acting*.P.*J*.

APPENDIX E.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
Apr. 10, 1980

I have this day filed Order Hearing Denied.

In re: 1/Civil No. 42705, Weingarten vs. Block, et al.

Respectfully,
Clerk.